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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1163

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

TENNESSEE CONSOLIDATED COAL COMPANY
and GRUNDY MINING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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UNITED MINE WORKERS OF AMERICA,

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v.

TENNESSEE CONSOLIDATED COAL COMPANY and GRUNDY MINING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America prays that a Writ of Certiorari issue to review: (1) the judgment of the United States Court of Appeals for the Sixth Circuit entered September 19, 1969 in Case No. 18,820, styled *Tennessee Consolidated Coal Company and Grundy Mining Company, Plaintiffs-Appellees v. United Mine Workers of America, Defendant-Appellant,*[1] where-

[1]Herein the United States Court of Appeals for the Sixth Circuit is called *"Sixth Circuit"*; the United States District Court for the Eastern District of Tennessee, Southern Division, *"trial court" or "district court"*; United Mine Workers of America, *"UMW"*; Tennessee Consolidated Coal Company, *"TCC"*; and Grundy Mining Company, *"Grundy"*.

in the Sixth Circuit affirmed the judgments entered by the United States District Court for the Eastern District of Tennessee, Southern Division (A. 25a, 81-85a)[2] in TCC's favor for $1,432,500.00 and an attorney's fee of $143,250.00 and in Grundy's favor for $67,500.00 and an attorney's fee of $6,750.00 and costs, respectively, after sustaining a jury's conspiracy finding and overruling UMW's motion for judgment or, in the alternative, for a new trial (96-102a); (2) the Sixth Circuit's order (A. 35a) entered November 14, 1969, denying UMW's petition for rehearing en banc; and (3) the Sixth Circuit's order entered November 21, 1969, allowing $10,000.00 "for attorneys' fees for services rendered in this Court" (A. 36a).

A certified record in said case, together with proceedings in the Sixth Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINIONS BELOW

The district court's opinion appears in Appendix B hereto (A. 37a, et seq.) and in the certified record (102-43a). The Sixth Circuit's opinion appears in Appendix A hereto (A. 1-25a), in the certified record and it is reported in 416 F.2d 1192.

JURISDICTION

The judgment of the Sixth Circuit was entered on September 19, 1969. A timely petition for rehearing en banc was denied on November 14, 1969, and this Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

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[2]The abbreviation "A." refers to the Appendix to this Petition. Other references (followed by the symbol "a") are to the page numbers of the Joint Appendix which is a part of the certified record filed in this Court's Clerk's office pursuant to Rule 21.

Unless otherwise indicated, all emphases are supplied.

QUESTIONS PRESENTED

1. In light of the antitrust immunity of labor unions and national labor policy, was there substantial evidence under the clear proof requirement of Section 6 of the Norris-LaGuardia Act to warrant the jury's verdict of conspiracy under the Sherman Antitrust Act?

2. Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement, and there is no direct evidence proving the conspiracy and Union denials thereof are uncontradicted, did the Sixth Circuit err in approving the district court's failure and refusal to determine the meaning and validity of the Protective Wage Clause, as a matter of law, and in submitting its meaning and validity to the jury for its determination?

3. In light of the antitrust immunity of labor unions and national labor policy, where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act in executing an industry-wide, multi-employer collective bargaining agreement, is it legally permissible for a court or jury to infer the existence of a conspiracy from effects and consequences of that agreement?

4. Did the Sixth Circuit err in holding that Section 6 of the Norris-LaGuardia Act does not require the unlawful act of conspiracy, upon which this action is based, to be shown by clear proof?

5. In light of the antitrust immunity of labor unions, the clear proof requirement of Section 6 of the Norris-LaGuardia Act and national labor policy, did the Sixth Circuit err in approving the district court's jury charge regarding (a) the applicable standard of proof, (b)

effects and consequences of acts of alleged conspirators, (c) jury determination of the Protective Wage Clause's meaning and validity, and (d) specific intent?

6. Did the Sixth Circuit err in approving the district court's interpretation of the jury's General Verdict and in holding that Rule 49(b), Federal Rules of Civil Procedure, barred United Mine Workers of America from complaining that the district court had misinterpreted the jury's General Verdict in holding it was not dependent upon the jury's finding as to the Protective Wage Clause?

7. Did the Sixth Circuit's approval of the jury's verdict on damages collide with national labor policy, and did it lack substantial evidentiary support under the Sherman Antitrust Act?

8. Was there error in the Sixth Circuit's refusal to strike the jury panel on the ground that the system used by jury commissioners failed to produce a venire reflecting a fair cross-section of the community?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Statutory provisions involved are Sections 1 and 2, Sherman Antitrust Act (15 USCA 1 and 2); Sections 4 and 6, Clayton Act (15 USCA 15 and 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); Section 1, National Labor Relations Act, as amended (29 USCA 141); Sections 1, 7, and 8(e), Labor Management Relations Act, 1947 [29 USCA 151, 157 and 158(e)], as well as Rule 49(b), Federal Rules of Civil Procedure.[3] Involved

[3]These statutes are herein called *Sherman, Clayton, Norris-La Guardia* and *Taft-Hartley,* respectively. Pertinent Constitutional and statutory provisions, as well as Rule 49(b), are found in Appendix C to this brief, pp. 86-98a.

also are the Seventh Amendment to the Constitution of the United States and Sections 1861-64 of Title 28 USCA.

STATEMENT OF THE CASE

A. The Judgments Appealed

This action involves implementation of this Court's guidelines in *Pennington v. UMW*, 381 U.S. 657 (1965) relating to UMW's exemption as a labor union from *Sherman's* proscriptions.

In 1964, TCC, a Tennessee corporation, and Grundy, a TCC wholly-owned subsidiary formed in 1959, alleged a UMW-major coal company conspiracy[4] to force small companies out of business in violation of *Sherman's* sections 1 and 2, sought treble damages from UMW under Clayton's Section 4 (15 USCA 15) from September, 1959 through 1963.[5]

UMW denied the conspiracy. It averred its exemption status as a labor organization within the Clayton Act's Section 6 (15 USCA 17); negotiation and execution of the several Agreements by it as a labor organization and its conduct in their enforcement did not constitute *Sherman* violations; all UMW acts and conduct were motivated by legitimate labor goals to secure uniform labor standards of wages and working conditions for its members pursuant to its long-existent policy; the 1958 Agreement's Protective Wage Clause (PWC) sought to prevent signatory operators from vitiating the National Agreement and to assure the maximum possible employment continuity for UMW members (52-74a).

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[4]Named as the conspirators with UMW were (40a): West Kentucky Coal Co., Bituminous Coal Operators Association, Consolidation Coal Co., Peabody Coal Co., Nashville Coal Co., Island Creek Coal Co., The Pittston Co. and Pittsburgh-Midway Coal Co.

[5]Plaintiffs' complaint appears at pp. 21-32a in the certified record and its theories at pp. 40-52a; UMW's answer at pp. 33-39a and its theories at pp. 52-74a.

UMW further contended TCC ceased producing coal in March, 1960, and thereafter acted as a coal sales agency or land company, and hence had no standing to maintain the present antitrust action as its injury was too remote and indirect to permit it to sue (73a).

In a jury trial, UMW motions for directed verdict were denied (910-13a, 1688-90a). The case was submitted to the jury on a "General Verdict Form" and, over UMW objections, on three "Special Issues" (1762-67a). On the "General Verdict Form", the jury found UMW engaged "in a conspiracy, as alleged by the plaintiffs, to unreasonably restrain trade or to monopolize commerce in the bituminous coal industry outside or beyond the exemption granted by the antitrust statutes to a labor organization and in violation of" *Sherman's* Sections 1 and 2 (93a; A. 46-47a). The jury answered Special Issue No. (1), finding UMW "did so act as to forfeit its exemption under the anti-trust laws" (94a; A. 47a). As to Issue No. (2), the jury found, "*prior to and apart from the National Bituminous Coal Wage Agreement as amended in 1958, the defendant, United Mine Workers of America did not conspire, combine or contract with the coal operators who signed the National Agreement that it would contract with non-signatory operators only upon the terms and conditions of the*" *National Agreement* "*as amended from time to time*" (94a; A. 48a). As to Issue No. (3), the jury found UMW and signatories to the National Agreement "did intend that by the terms of" PWC, UMW agreed "that it would contract with non-signatory operators only upon the" National Agreement's terms (94-95a; A. 48a).

The jury awarded TCC $977,500.00 and Grundy $22,-500.00 (A. 47a; 1780-83a). UMW moved to set aside the jury verdict and for judgment in its favor in accordance

with its motion for directed verdict, or for a new trial (96-102a). A district court opinion (A. 37-81a) denied the motions, found the verdict excessive as to TCC and suggested a remittitur of $500,000.00, which TCC accepted (148a). On May 8, 1968, the district court entered judgments against UMW in amounts noted (*ante*, p. 2), the respective judgments being three times the jury's verdict as remitted (12a, 144-47a).

Upon appeal, the Sixth Circuit affirmed the judgments (A. 25a).

B. The Conspiracy Issue

Prior to the instant case's trial, its presiding judge[6] rejected the claim of southeast Tennessee coal operators that UMW conspired with non-labor groups in violation of *Sherman*. *Ramsey v. UMW*, DC, E.D. Tenn., S.D., 1967, 265 F.Supp. 388.[7] Herein, the district court noted, "the evidence followed very closely" that in *Ramsey*. The "only significant differences", the district court herein avowed, are *Ramsey's* evidence of violence omitted upon the present trial and the "additional evidence not introduced" in *Ramsey* with respect to PWC, which consisted "principally of the minutes of the Joint Industry Contract Committee" (JICC) following the 1958 Agreement (A. 45a). Those minutes, read to the jury, *and they are undisputed*, are discussed, *post*, pp. 24-25.

As in *Ramsey*, UMW officials and other witnesses denied the charged conspiracy and making any agreement other than the National Agreement. As in *Ramsey*, these denials were undisputed; and *Ramsey* declared

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[6]Honorable Frank W. Wilson, District Judge, heard both *Ramsey* and the case at bar.

[7]Affirmed, *Ramsey* v. *UMW*, 6 Cir., 72 LRRM 2321 (1969) by an equally divided court. In the instant case, the district court expressly adopted its *Ramsey* opinion and relied thereon (A. 45-46a).

such testimony "cannot be ignored" (265 F. Supp. 432). The district court herein declared, "If this Court were sitting as a trier of the facts in the present case, it would make the same findings of fact on the present record as it made upon the record in" *Ramsey* (A. 50a), and "Although if this Court were itself weighing the evidence, it would conclude, as . . . in" *Ramsey*, "that 'reviewing the evidence as a whole . . . the Court is unable to find that the evidence clearly reflects . . . plaintiffs were the victims of any conspiracy between the U.M.W. and any coal operators or other non-labor organization to eliminate or suppress competition in the coal industry or to eliminate or suppress the production and sale of coal by the plaintiffs' " (A. 51a).

Ignoring the denials and its *Ramsey* findings, the district court warranted the jury verdict herein upon the premise that the "test is whether substantial evidence exists in the record to support the verdict", citing *Fox West Coast Theatres Corp. v. Paradise Theatre*, 9 Cir., 264 F.2d 602, 605 (1958)—a case involving a *conflict* in the evidence (A. 50-51a), although the district court further declared, "In so holding the Court does not indicate its approval of that verdict in the sense that the Court concurs in the verdict, but only in the sense that the Court believes there was substantial evidence . . . on which the verdict could have been based" (A. 58a).

Ignoring the district court's expressed doubts concerning the verdict, the Sixth Circuit agreed with the district court's characterization of the evidence as conflicting and its test standard (A. 6a). *Neither the Sixth Circuit nor the district court specified any conflict in the evidence to warrant the lower court's characterization thereof. This is due to the fact there is no existing conflict* herein. Both ignored *first Pennington's* re-

quirement of "clear proof" and the Sixth Circuit's prior holding that the proper standard of proof in a *Sherman* suit against a labor union is *Norris-LaGuardia's* "clear proof" standard which, under *UMW v. Gibbs*, 383 U.S. 715 (1966), means *clear, unequivocal and convincing proof. Lewis v. Pennington*, 400 F. 2d 814; *Ramsey*, 72 LRRM 2325.

As noted (*ante*, p. 6), the jury exonerated UMW of the conspiracy charges in the 1950-58 period, finding [Issue No. (2)], *"prior to and apart from" the 1958 Agreement, UMW "did not conspire, combine or contract with" signatory operators to contract with "non-signatory operators only upon" the National Agreement's terms.* In so finding, it upheld UMW contentions of no conspiracy in the 1950 Agreement's execution, that BCOA's formation was unrelated thereto and did not result from UMW-operator agreement, that the collective bargaining pattern after 1950 did not change except to avoid "fish-bowl" publicity, and that increased labor costs in the post-1950 period were not related to conspiracy but resulted from arms-length bargaining.[6]

Both the district court and the Sixth Circuit found the jury's general issue verdict and Issue No. 3 verdict supported by "substantial evidence". These are discussed *seriatim:*

1. ***Issue No. 3: The protective wage clause and predatory intent.***

Prior to the instant case, *Ramsey* (265 F. Supp. 412) held PWC valid under the rule that where a clause is

[6]Noteworthy is the district court's concession of similarity of facts in *Ramsey* and those in the case at bar, because the jury's finding accords with *Ramsey* (265 F. Supp. 406-09). It is also consistent with *Lewis v. Pennington*, DC, E.D., Tenn., N.D., 1966, 257 F. Supp. 815, and the Sixth Circuit's affirmance thereof [400 F.2d 806 (1968)] and *Ramsey* (72 LRRM 2321).

capable of two reasonable constructions that construction should be adopted which does not result in violation of law, and "The only direct evidence in the record is to the effect that the Union pursued" its labor standards policy "upon its own, and not in agreement with any employer." Sanctioning PWC's interpretation, the Sixth Circuit's *second Pennington* held "the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers" and inclined to the conclusion that the record contained "insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown" (400 F.2d 814). The Sixth Circuit's affirmance of *Ramsey* (72 LRRM 2321, 2323) affirmed the district court's *Ramsey*. This Court rejected certiorari in *second Pennington* (393 U.S. 983, reh. den. 393 U.S. 1045).

Ignoring undisputed denials that UMW entered into any agreement other than the National Wage Agreements, that PWC had its genesis in 1943 contract negotiations as a clause to protect UMW's contract and preserve miners' interest, that both *Ramsey* and *second Pennington* alike held PWC valid, and legal principles which occasioned *Ramsey* and *second Pennington* to hold PWC valid, *the district court differentiated those cases from the instant one on the ground that those cases had been judge-tried whereas the instant case had been jury-tried* and declared "Its meaning became an issue of fact for determination by the jury under appropriate instructions from the Court and extrinsic evidence as to the surrounding circumstances, including the practical construction given by the parties, may be received in aid of its interpretation" (A. 55-56a).

The Sixth Circuit, upholding the propriety of submitting PWC to the jury for interpretation, agreed that "Evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation" and approved the district court's "finding of the jury is supported by substantial evidence" (A. 10a, 13a). *The Sixth Circuit, as did the district court, failed to explain why principles which caused it to approve PWC were inapplicable in a jury trial, as UMW pressed. Both disregarded UMW's complaint that the jury charge concerning "intent" collided with the Sixth Circuit's Ramsey and second Pennington, and of the evidence's insufficiency under appropriate standards of proof where a labor union is involved.*

2. *The general verdict finding: Increased labor costs and reduction of the market price of coal.*

In light of the jury's findings on the three Special Issues (94-95a), UMW contended the jury's General Verdict as to liability that UMW engaged in a conspiracy beyond its exemption was limited to the jury's Special Issue (3) finding as to PWC. Disagreeing, the district court declared that "in arriving at their general verdict the jury was charged with the duty of determining whether the defendant had committed an antitrust violation during" September 24, 1959 through 1963, the action's period of limitations, and Special Issues Nos. (2) and (3) would not necessarily be determinative of the General Verdict on the liability issue (A. 57a).

The district court pointed to plaintiffs' contention they were victims of a *Sherman* conspiracy seeking to accomplish its alleged unlawful purpose *"both by increasing its labor costs and by reducing the market price of coal"* and believed "There was evidence . . . sufficient

to create a jury issue with respect to each of these facets" (A. 60a) and that "there does exist substantial evidence . . . in support of the jury verdict on the issue of liability" (A. 58a). Failing to specify evidence it relied upon to support its conclusion, it avowed its approval of the General Verdict but did not indicate approval in the sense it concurred in the verdict, but only in the sense it believed "There was substantial evidence . . . on which the verdict could have been based" (A. 58a).

Ignoring the district court's expressed doubt of the jury's General Verdict, the Sixth Circuit held "The view adopted by the District Judge in his opinion is consistent with the jury's answers. We approve it" (A. 16a).

Recognizing that UMW and BCOA officers and agents denied agreement to impose the National Agreement on all operators, *but ignoring these denials were uncontradicted*, the Sixth Circuit declared the denials not conclusive on the jury but were to be considered with all other evidence (A. 12a).

C. The Issue of Whether Effects and Consequences May Be Substituted for Proof of a Conspiracy as a Predicate for a Jury Finding That a Labor Union Forfeited Its Labor Exemption From Conduct Proscribed by the Sherman Act.

Jury findings herein adverse to UMW were based upon district court jury charges that *"it is not necessary"* that UMW "have had a specific intent to establish a monopoly or *destroy competition"* and the *"required intent or purpose is present* if monopoly results as the *necessary consequence of what is done"* (1726a); that *"it is not essential that there should be a specific intent* to restrain commerce or create a monopoly" if the restraint or monopoly is the "necessary result of a combination, conspiracy or contract" (1728a); that "persons so combined or contracting will be presumed to have intended

the necessary and the natural consequences of their acts and agreements" (1728a), as well as other comparable statements (1728-30a). The district court's charge varies from plaintiffs' concession, though erroneous, made at the trial, that they relied on "conspiracy and combination" evidenced by "the national contract, that is inevitably a combination" (1757a) as the basis for UMW's forfeiture of its exemption (Second S.A. 10).[9]

It coincides, however, with the plaintiffs' Sixth Circuit position that "This case is not based solely on predatory conspiracy to drive operators such as TCCC out of business but also encompasses the claim that UMW made an agreement with BCOA (with particular reference to PWC) which was unreasonable, having the expected and inevitable *effect and consequence* of destroying many smaller companies and of creating concentration in the industry".[10]

Though *"effects and consequences"* as a substitute in lieu of proof of a conspiracy was rejected in *second Pennington* (400 F.2d 814) and by this Court's refusal of the certiorari petition therein (393 U.S. 983), which UMW pressed upon the Sixth Circuit as manifesting error in the district court's instructions, the Sixth Circuit approved the charge, holding "Other claimed errors in the court's instructions have been examined and in our judgment they do not merit discussion" and "We find no prejudicial error in the instructions" (A. 22a).

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[9]Pagination is to the Second Supplement to Joint Appendix filed by UMW.

[10]This statement is found in the brief of Tennessee Consolidated Coal Company and Grundy Mining Company filed in the Sixth Circuit in the instant case, p. 76.

D. The Issues Concerning Other Erroneous Jury Instructions

1. *Standard of proof.*[11]

The district court charged plaintiffs' duty was to prove their claim and various elements thereof by a *preponderance of the evidence,* defining *"preponderance"*, except that "Section 6 of the Norris-LaGuardia Act requires that the liability of labor organizations for the acts of officers, members, agents or others" had to "appear by clear proof" (1702-04). Returning to the "preponderance" rule, the district court charged that UMW "has monopolized, within the meaning of the antitrust laws, *if it appears from a preponderance of the evidence* . . . that first they knowingly combined or conspired either to obtain or to maintain the power either to remove or to exclude, or to keep out competitors from the field of competition" (1725a).

Both plaintiffs and UMW excepted to the instructions on standard of proof, causing the district court to undertake to clarify and correct its charge (1760-61a). The Sixth Circuit's opinion contains the district court's efforts (A. 17-21a) which concluded with the following:

> "Now, to the extent that the Court may have instructed you otherwise, during any portion of the case or with reference to any specific issue in the case *with respect to the purpose required or imposed upon the defendant, you will disregard that previous instruction and apply the instruction that I have now given to you, and as I have charged you originally with respect to the burden of proof"* (A. 21a),

prompting UMW's argument that the phrase, *"as I have charged you originally,"* is an obvious reference to the *preponderance rule* given in the initial discussion on

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[11]Charges pertaining to the standard of proof required are found at pp. 1702-03a, 1719-23a, 1725a, 1760-61a.

the standard of proof, and that the district court's charge was erroneous, confusing and prejudicial; but the Sixth Circuit, agreeing with the district court (A. 62-63a), declared "they stated the respective contentions of the parties fairly, defined the issues properly, and applied the law favorably to UMW" (A. 17a).

To be noted, however, is that the district court rejected (Second S.A. 11-12) plaintiffs' contention that it should have confined the "clear proof" rule to *agency* questions, while UMW contended the preponderance rule was not applicable to liability issues (1749a). The Sixth Circuit avowed, "Section 6 does provide that participation, authorization or ratification must be shown by clear proof" *but that "Section 6 does not state that the unlawful acts must be shown by clear proof"* (A. 17a).

2. *Submission of PWC's meaning to the jury.*

In contrast to the Sixth Circuit's *second Pennington* recognition that the district court "properly construed" PWC by applying the legal principle that, where a clause is capable of two reasonable constructions, "the construction should be adopted that does not result in a violation of law" and that PWC "properly construed" did not require UMW to bargain with non-signatories only on the basis of the National Contract (400 F.2d 814), and over UMW complaint (1751a; Second S.A. 1-8) that PWC's validity was a legal question for the trial court, and particularly so in light of uncontradicted denials of any conspiracy, the district court charged that in determining the *"intent of the parties"* the jury could look to PWC's language, all contractual language "relevant to that clause" and to all conduct of the parties with respect thereto, considering words used in their ordinary and usual meanings, the grammatical structure of the clause in accordance with usual rules of grammar

and sentence construction, and any other evidence admitted "to the extent" it might be relevant or "you may consider . . . worthy of consideration" (1735-36a, 1779a).

The district court's *rejection* of TCC's contention that PWC was a *per se* violation of *Sherman* (Second S.A. 12) emphasizes its error. Without explicating why *second Pennington's* rule of construction is applicable in a judge-tried case but inapplicable in a jury trial and why there was invalidity in UMW's contention that it was incumbent for the court to charge the jury that PWC was lawful, the Sixth Circuit disposed of UMW's contentions, *stating it to be one of the errors which "in our judgment . . . do not merit discussion"* (A. 22a).

3. The charge on specific intent.

In direct conflict with *second Pennington's* holding that " 'predatory intent' " is essential to prove an anti-competitive conspiracy (400 F.2d 814), the district court, over UMW exceptions (1750-51a), charged it was *not necessary* for UMW to have a "specific intent to establish a monopoly or *destroy competition*" (1726-28a). *The Sixth Circuit included this error as one which did not merit discussion* (A. 22a).

The Sixth Circuit also found "no prejudicial error in the instructions" above discussed (A. 22a).

E. The Issue of Whether UMW's Claim That the District Court Misinterpreted the Jury's General Verdict, and the Sixth Circuit's Answer Thereto.

In light of jury answers to the three Special Issues, discussed *ante*, pp. 9-12, UMW contended the jury's General Verdict as to liability that UMW engaged in a conspiracy, as plaintiffs alleged, beyond the exemption granted by antitrust laws to a labor union was limited to its Special Issue (3), namely, that UMW

and signatories to the 1958 Agreement "intended" by PWC's terms that UMW agreed to "contract with non-signatory operators only upon" the National Agreement's terms.

The Sixth Circuit agreed with the district court's rejection that it had misinterpreted the General Verdict, asserting that "If . . . UMW thought the special findings were inconsistent, unclear or ambiguous", objections should have been raised "at that time" (A. 16a). The Sixth Circuit *overlooked* that no inconsistency appeared on the face of the jury's findings. On their face, they were wholly consonant. Inconsistency appeared for the first time when the district court rejected its misinterpretation as a new trial ground (A.16a), thus rendering inapplicable Rule 49(b), Federal Rules of Civil Procedure, and demonstrating the Sixth Circuit's inaccuracy in holding UMW "waived any objection to the general verdict on grounds of inconsistency with a special finding" (A. 15a).

The Sixth Circuit's suggestion that UMW had ample opportunity to submit its own interrogatories on the predatory conspiracy issue when the court submitted its interrogatories (A. 16a) and that UMW "cannot now be heard to claim that the issue was not included in the general verdict" ignores the district court's instructions on intent (*ante*, pp. 12-13) and UMW's objection thereto. In light thereof, it would have been a useless gesture for UMW to have submitted an interrogatory as to anti-competitive intent.

F. The Issue of Damages

The district court, rejecting the jury's verdict of $977,500.00 for TCC because it had ignored losses attributable to other causes, suggested a remittitur of $500,000.00,

which TCC accepted (A. 73-74a, 83a), but did not disturb Grundy's award of $22,500.00. In addition to contending TCC had no standing to maintain the instant action (*ante*, p. 6), UMW noted in the Sixth Circuit that 1962 strike activity did not result from failure in bargaining between UMW and Grundy, but because of Grundy's refusal to recognize UMW as bargaining agent until certified as such for Grundy's employees, and Grundy's refusal to meet with UMW even after such certification. Plaintiffs' damage awards are predicated on the theory they would have earned the amounts claimed had they been privileged to pay in wages and benefits *what they were prepared, unilaterally, to establish, but which neither UMW nor its members were willing to accept.*

Contrary to the damages awarded, *Hunt* v. *Crumboch*, 325 U.S. 821, 825, holds that "without infringing the Anti-trust laws", laborers can "sell or not sell their labor as they please, and upon such terms and conditions as they choose".

The Sixth Circuit saw "no basis for reducing the verdict . . ." (A. 22a).

G. The Issue of UMW's Motion to Strike the Jury Panel.

Upon evidence taken (1784-1832a; Supp. App. 5-19), the trial court rejected (76-92a, 124a) UMW's motion to strike the jury panel (75a) because, *inter alia*, the manner in which the jury list was compiled neither met requirements of Title 28 USCA, Section 1864 but conflicted therewith, nor constituted an impartial jury drawn from the community's cross-section, nor accorded UMW "the right to be tried by a jury" as guaranteed by the Federal Constitution's Seventh Amendment (75a).

The 1960 U. S. Census showed that in counties comprising the judicial district involved herein, wage earners constituted 66% of total work population if clerical employees and working foremen are excluded, and 80% if included. Managerial employees represented but 7.8% of working population and farmers 2.4%. The remaining 9.8% consisted of professional, technical and kindred workers.

By the district court's own analysis, of the 120-member jury panel, at most 21% were wage earners (83a). When the April, 1967 term petit jury panel was drawn, 20.4% were non-supervisory wage earners and 79.6% were self-employed businessmen, professional men, farmers, managerial employees, executives, or their wives (86-92a).

Jury commissioners used the "key men" system to suggest names of potential jurors, who were either businessmen, professional men, farmers, managerial employees, or their wives (1795-1803a), or names obtained from personnel directors of local companies and Republican Executive Committee members (1812a). One commissioner used his own criterial (1818a). *Not a single wage earner or labor union official was a "key man"* (1784-1832a).

The district court overruled UMW's motion, first, because the evidence failed to show a cognizable element of the eligible citizenry had been deliberately or intentionally excluded from the panel; and second, because "the panel was drawn from the jury box . . when a reasonable and fair cross-section of the community was represented among the names within the box" (80a). UMW submits it is not enough to say "that a statistical correspondence between the composition of any particular jury panel and the total population is not required"

(A. 108a) because the commissioners' system consistently resulted in venires with a disproportionately small number of wage earners and a disproportionately large number of managerial types.

The Sixth Circuit, *noting the district court's finding that commissioners could improve their practice by enlarging the sector of suggestors and by selecting jurors at random from poll lists,* declared, "the abuses" did not rise to the level of discrimination against any group, upheld the "key man" system, and held district court findings to be "supported by substantial evidence" and "not clearly erroneous" (A. 24a). The Sixth Circuit rejected UMW's contention that the district court's holding the panel could not be stricken *unless* a particular group had been *intentionally excluded* conflicts with *Rabinowitz* v. *U. S.*, 5 Cir., 366 F.2d 34 (1966). Its holding that *Rabinowitz* found a particular definable group had been excluded (A. 24a) contrasts with *Rabinowitz's* statement that negro percentage was 5.8% *on the jury list* when the negro population was 34.5% of adult population and did not serve to validate the commissioners' actions (366 F.2d 39), and "The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury" (366 F.2d 59).

It conflicts, too, with this Court's *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220, that the fact that 5 jurors of the 12 which tried the case "belong more closely with the workingman and employee class than . . with any other class" did not save the case from this Court's condemnation. As *Thiel* recites (p. 220), *"Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society".*

THE FACTS

A. There Are Undisputed, Positive Denials That UMW Entered Into Any Agreement Other Than the Collective Bargaining Agreement.

No witness and no documentary evidence showed UMW entered into any conspiracy. Undisputed are denials of UMW's John L. Lewis, John Owens, W. A. Boyle and Welly K. Hopkins of any agreement to set wages or other employment standards at levels designed to eliminate any coal operators from the industry (919a, 948a, 1577a, 1647-48a, 1031-32a), or that UMW ever agreed to impose the National Agreement upon employers other than those bargaining at a particular time (1053a), or that UMW agreed with any operator whereby it was prevented from negotiating or executing a contract on terms differing from the National Agreement (1648a). Contrariwise, plaintiffs' vice-president and secretary and an attorney (694-95a) corroborated UMW testimony that Tennessee operators were told, "All issues are negotiable" (695a, 1095-96a, 1123a). *Similarly undenied* is testimony of George H. Love, a chief negotiator of the 1950 Agreement, of entering into no agreement with any UMW representative with respect to eliminating any coal operator, or that coal prices and markets would be controlled (1510a), or that there was a UMW-employer side agreement, in 1950 or thereafter, that "terms of the labor agreement reached" would be imposed by UMW on other bargaining units (1510-11a).[12]

B. UMW's Historic Policy For National Uniformity of Labor Standards.

National uniformity in wage rates and labor standards in the coal industry has been UMW's consistent policy since its origin in 1890. Removal of differences in

[12]Other corroborative denials appear, *ante*, pp. 7-8, 10, and *post*, p. 26.

labor standards as an element of competition in the coal industry has been the core of UMW's policy throughout its existence. UMW Conventions through the years mirror authoritative expression to its policy (982-1001a, 1613-16a). UMW's experiences show that wage-cutting to reduce costs and prices by one operator induces a cycle of wage-cutting by other operators which results in progressively depressing wages until it reaches the lowest level that is payable (988a, 989a, 1617-18a).

In 1941, the National Mediation Board, taking note of UMW's historic policy, observed that day-wage uniformity had been disrupted by the industry's chaotic condition between 1924 and 1933, and recommended an elimination of the 40 cents North-South differential, concluding that increased labor cost entailed in eliminating a differential is not sufficient to justify the Board's recommendation that the differential be maintained to preserve existing fair competitive opportunities (317-28a).

From 1941 to the present there has been almost complete uniformity of wage rates for day-men and a flat across-the-board wage increase given to the piece-worker has been equal in amount to the increase given the day-worker. Though pre-1941 differentials still exist, otherwise UMW has accomplished its historic policy of wage uniformity.[13]

As noted, *ante*, p. 7, the district court noted the similarity of facts herein to those in *Ramsey* and adopted *Ramsey's* summarization of facts. Facts pertaining to pre-1950 collective bargaining, the 1950 National Agreement's negotiation and execution, the post-1950-collective bargaining antedating the 1958 Agreement, narrated in *Ramsey* (265 F. Supp. 403-10), were held by *Ramsey*

[13]See *Ramsey*, 265 F.Supp. 404-05.

as not inferring any *Sherman* conspiracy (p. 410). The jury likewise found no conspiracy as to these matters (*ante*, p. 9), thus obviating, UMW believes, the necessity of detailing such facts.

C. The 1958 Agreement's PWC.

The 1958 Agreement's PWC is found in Appendix D hereto (p. 99-104a). It had its genesis in 1943 contract negotiations when UMW sought, and the National War Labor Board directed, each agreement contain a clause to protect the contract and preserve miners' interests, reading, "operators agree that they will not let any operating mines subject to this agreement as a subterfuge" (1038a). Every contract from 1943 through 1951 carried the anti-lease clause (1040a). It was amended in 1952 to read:

> "operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said *operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement*" (1040-41a),

which language was carried forward in the 1955, 1956 and 1958 Agreements (1041a). UMW believed signatory operators were "chiseling" on the contract (1041a); and in negotiations for the 1958 Agreement, UMW achieved the Protective Wage Clause (PWC), requiring coal mined, produced, prepared, or acquired by signatory operators be mined under labor standards as favorable to employees as those in UMW's contracts (410a).

Construing PWC's Paragraph A., *Ramsey held* (265 F. Supp. 412) that PWC "does not constitute an express commitment" by UMW to BCOA "not to bargain with any other coal operator upon" terms other than the National Contract, and that "The only direct evidence . . . is to the effect that" UMW pursued its policy of uniformity of wage and labor standards "upon its own" policy "and not in agreement with any employer".

Ramsey (265 F. Supp. 410) describes PWC's Paragraph B as having to do with operators' obligation "in regard to subcontracting and leasing" and that subsequent paragraphs "have to do with the functioning of a joint industry contract committee in disposing of reported cases in violation of" PWC.[14] Herein the district court noted that *Ramsey* lacked the JICC minutes. These are *undisputed* and show the following:

At the January 21, 1959 meeting, Union members were Lewis, Kennedy and John Owens; operator members were Hamilton K. Beebe, Edward G. Fox and Joseph E. Moody, representing BCOA and the following associations: Southern Coal Producers, Illinois Coal Operators, Indiana Coal Operators, Indiana Coal Producers and Western Kentucky Coal Producers (415a, 417a).

Subsequent JICC meetings adopted operator compliance forms requiring certification of operator compliance with PWC's provisions that each employee covered "is receiving" full wages and that each operator was paying in full the 40¢ royalty to the United Mine Workers of America Welfare and Retirement Fund (419-20a). UMW district presidents were to certify a list of signatory operators and mines engaged in bituminous coal produc-

[14]PWC's current status of validity is shown in *Lewis v. NLRB*, D.C. Cir., 350 F.2d 801 (1965), and the recent NLRB decision, *Boyle, et al.*, NLRB Case No. 5-CE-6, 179 NLRB No. 80, 72 LRRM 1426 (Nov. 4, 1969), with Board Chairman McCulloch dissenting.

tion, and signatory operators could be informed if a specified operator or mine was listed, but complete lists were unavailable to any operator (420a).

Procedures for processing alleged PWC violations were adopted (421-22a); and failure to file compliance with PWC's terms constituted "a prima facie violation of" PWC. *All complaints from JICC's executive director related to operator-failure to file the required certification* (420-24a, 467a, 468a, 471a).

At the November 4, 1959 meeting, JICC discussed its status "with reference to the recently enacted Landrum-Griffin Bill"; and because of uncertainties and other factors derivative therefrom, JICC suspended further proceedings and PWC's administration and enforcement pending appropriate clarification and interpretation of the sundry problems until May, 1960 (472-73a). The March 31, 1964 meeting recorded PWC's deletion from the National Agreement effective April 2, 1964 (478-79a).

Notably, as shown (*post*, p. 35), PWC's validity as a labor standards clause to preserve UMW members' work opportunities and standards has been upheld.

D. UMW Investments in West Kentucky Coal Company; The TVA Coal Market and Coal Pricing Thereon by West Kentucky and Other Alleged Conspirators.

Ramsey (265 F. Supp. 412-23) details the voluminous evidence relating to the several subjects indicated above. TCC and Grundy made no challenge of the accuracy of *Ramsey's* factual recitals.

The district court's claim herein (A. 60a) the jury verdict was supported by evidence of a conspiracy to increase labor costs must be evaluated in light of *undisputed* evidence that the sole wage increase, provided in

the 1958 Agreement, amounted to $2.00 per day in two steps (1941-42a), which was consistent with increases in other industries, with prior increases in bituminous coal since World War II, and with UMW's across-the-board policy, achieved in 1941 and followed since then.

While UMW made investments and loans with respect to West Kentucky, they were made prior to 1958, and in the period in which the jury found UMW had not conspired in violation of *Sherman; it is uncontradicted UMW played no part in West Kentucky's management or pricing policies.*[15] *Indeed, plaintiffs' counsel stated, "We don't say that UMW controlled the marketing policy of West Kentucky . . ."* (1650a).

In dealing with the TVA coal market, *Ramsey* noted TVA pays about 20 cents to 22 cents per ton less than other public utilities on the average (265 F. Supp. 416). Upon non-conflicting evidence, *Ramsey* declared, "West Kentucky followed, but did not lead, the market", West Kentucky's price "was a matter of legitimate business judgment, with a view to making a profit on the coal while at the same time meeting competition in the market" (265 F.Supp. 419, 421), and "the evidence *fails* to establish that West Kentucky . . . or its subsidiary Nashville Coal . . . engaged in predatory pricing of coal upon the T.V.A. market" (265 F.Supp. 422).[16]

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[15]Numerous witnesses so testified (938a, 1031-32a, 1335a, 1661a, 1670a, 1671-72a). The district court's *second Pennington* declared, "Ten witnesses each of whom was in a position to know, testified positively that there was no predatory price fixing" (257 F.Supp. 863, aff'd. 6 Cir., 400 F.2d 806).

[16]Of the other various conspirators alleged, *Ramsey* found, on *undisputed* evidence that "Other than Peabody . . . these coal producers are not believed by the Court to have had sufficient impact upon the T.V.A. coal market to deserve further attention" (265 F.Supp. 417), and that as to Peabody, the Court declared "the evidence does not sustain the conclusion that the relationship between Peabody and West Kentucky was anything other than a competitive relationship . . ." (265 F.Supp. 418).

E. Events In Southeastern Tennessee Coal Field.

Ramsey (265 F.Supp. 423-430) details the evidence concerning plaintiff's contention they were *Sherman* victims upon UMW's part directed specifically at the Southeastern Tennessee coal field.

TCC operated at a profit throughout most of the 1950's (1956a). To the complaint that mechanization in Southeastern Tennessee's Sewanee seam must await refinement of equipment, *Ramsey responded,* "Neither the nature of the competition, the coal seam characteristics, the comparative adaptability to mechanization, nor other factors enhancing the problems of marginal coal producers can compel wage differentials nor form a basis for a court altering the legislatively permissible labor union policy of national wage uniformity" (265 F. Supp. 408). TCC's mines were progressively modernized to achieve productivity (248a, 257a). Though through 1960 TCC kept pace with the national productivity of 12.83 tons per man for deep mines (169a, 1975a), in 1957 TVA sought to encourage increased productivity to 17½ tons per man day, and awarded TCC a contract (248a). Absenteeism caused TCC to complain to UMW's District 19, which undertook corrective action, with success (250-51a, 1229a). TVA cancelled TCC's contract in June, 1959, because TCC's plans were "indefinite", "inadequate", and "offered no alternative for achieving increased . . . productivity" (249-50a). TCC gave UMW notice of cancellation of its National Agreement, and TCC's operations ceased March 15, 1960 (206a), and thereafter sought wages geared to productivity (206-13a), which District 19 representatives and employees refused (210a, 212a, 1148-50a, 1238a). TCC sought unsuccessfully to operate on a non-union basis through Grundy (214-15a); requested the men to return as

Grundy employees at 75¢ an hour below their former rate (215-19a, 255-56a, 1900-04a); the men refused (219a). TCC then assumed the role of a non-operating company, and has not since employed mining employees (233a, 241a, 264a).

Arrangements made by TCC with experienced engineers (Allen and Garcia) in 1961 resulted in execution of a UMW contract and a supplementary one with District 19 concerning seniority rights of former employees (213a, 219-20a, 644a). Numerous disputes between management and the men relating to employees' competency, seniority, alleged fueding between "two factions" within the local union, and trouble caused by discharge of an officer of the company, occurred during the operation, which closed June 6, 1962, by reason of a "tremendous rock fall".[17]

Allen and Garcia started a new mine for TCC (Gray's Creek No. 11) in July, 1962 (221a). Seniority problems continued;[18] UMW proposed that grievances be submitted to arbitration; Allen and Garcia refused (683a, 1161-62a, 1170a); Allen and Garcia terminated their agreement with TCC on August 21, 1962 and gave a 60-day notice of termination of UMW's contract (221a, 675a, 672-73a).

Ramsey declared "there is no direct evidence" the foregoing "was a part of any Sherman Act conspiracy" upon UMW's part (265 F. Supp. 427).

Upon Allen and Garcia's withdrawal, TCC operated its Gray's Creek mine through Grundy under UMW's contract during the 60-day terminal period and without a contract thereafter until the December 26, 1962 work stoppage, discussed below. In August, 1962, UMW's Dis-

[17] 680a, 746-50a, 757a, 655a, 679-80a, 674a, 1151-59a, 1161-63a, 1201-05a, 681a, 653a, 267-68a, 221a, 664a, 682a.

[18] 221a, 664-65a, 650a, 666-67a, 1080-83a.

trict 19 gave termination notices of its National Agreement to truck mine operators, including those on TCC leases, because of failure to pay royalties due the UMWA Welfare and Retirement Fund and vacation pay due under the contract.

The Sewanee negotiations

Sewanee Coal Operators Association ("Sewanee") was formed in 1962 to negotiate with UMW (1093-95a). Area truck mines, whose UMW contracts had expired, were members. TCC and Grundy were "qualified members" (709a). Four meetings were held between District 19 and Sewanee under auspices of the Federal Mediation and Conciliation Service (1095-1100a). Sewanee had no authority to negotiate for TCC or Grundy (694a, 708-09a).

Sewanee, claiming its seam's irregularity and inadaptability to mechanization made it impossible to operate under the National Agreement, sought a sliding scale based upon varying degrees of mechanization and reduced Welfare Fund royalties, below UMW's established rates (1099a, 1109-10a). UMW District 19's request to examine company books to substantiate the plea was rejected (1096-97a), as was Sewanee's wage proposal, District 19's president explaining miners had not had an increase in approximately three years.

The work stoppage of December 26, 1962

On December 26, 1962, Grundy employees ceased work when Grundy refused to check off union dues (223a, 1100a, 1164a, 1212-13a). District 19 charged TCC with inciting the strike, with failure to maintain the same employment conditions, and with refusing to process grievances and deduct dues (1101-04a). TCC's president rejected District 19 efforts to meet to reach a settlement (1111-14a).

Spreading to the truck mines, the strike continued throughout the damage period (223-27a). In May, 1963, Grundy reopened its mine without a union contract, paying wage rates "close to" those of UMW's contract, except for the Welfare royalty, if employees earned full incentive pay. It has operated in such manner since that time (224a, 894-96a).

NLRB's certification of UMW as representative of the employees, and Grundy's disregard of UMW's request to bargain

In 1963, UMW obtained NLRB certification as representative of employees in a unit comprised of Sewanee members, including Grundy and TCC (1087a, 1104a), employees voting 480 for UMW and 96 for Southern Labor Union. Grundy thereafter ignored UMW proposal to work out a tentative agreement whereby men could return to work (289a, 711a, 1105a). In June, 1965, NLRB certified UMW as bargaining representative (1104a). UMW requested unit employers to bargain, but TCC and Grundy (as well as the others) again ignored the request (289-90a, 713a, 1105a).

Of evidence pertaining to the Southeastern Tennessee coal field, *Ramsey* declared, "Clear proof does not appear, either directly or by inference, that the U.M.W. acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field . . ." (265 F.Supp. 430); "the evidence does not demonstrate" UMW "acted in conspiracy with employers elsewhere in its dealings with the plaintiffs and others in the Southeastern Tennessee coal field" (265 F.Supp. 431); and "Under such circumstances the U.M.W. could not be required, as a means of escaping antitrust liability, to bargain for labor standards, wages

or working conditions that would improve the plaintiffs' competitive position by the reduction of wages or labor standards, by gearing wages to the status of mechanization or its lack, or by tying wages to productivity" (265 F.Supp. 431).

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT'S APPROVAL OF THE JURY VERDICT REPRESENTS AN INCORRECT IMPLEMENTATION OF PRIOR IMPORTANT DECISIONS OF THIS COURT PERTAINING TO A LABOR UNION'S IMMUNITY FROM CONDUCT PROSCRIBED BY THE SHERMAN ANTITRUST ACT AND NULLIFIES A UNION'S RIGHT TO ENTER INTO AN INDUSTRY-WIDE, MULTI-EMPLOYER COLLECTIVE BARGAINING AGREEMENT.

Despite repetitive Congressional refusals to prohibit industry-wide bargaining,[19] the Sixth Circuit has yielded to plaintiffs' contention that UMW should have abandoned its historic policy of uniformity of labor standards, acceded to plaintiffs' demand that they be subsidized at the expense of UMW's coal miner members and afforded a wage advantage over their competitors derivative from regional collective bargaining, and that effects and consequences of a lawful industry-wide collective bargaining agreement sufficed to prove a *Sherman* conspiracy.

The Sixth Circuit's holding collides not only with Congressional will and national labor policy, but it is incongruous with *first Pennington's* holding which accorded UMW the right to adopt a uniform wage policy and, as a matter of its own policy, to seek the same wages from other employers (381 U.S. 664). It violates this Court's recognition since *Apex Hosiery Co. v. Leader,* 310 U.S. 469, that under *Clayton's* Section 6

[19]See the dissenting and concurring opinions of Justices Goldberg-Harlan-Stewart to *first Pennington* in *Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, 697, 712-13 and fn. 20, citing *NLRB* v. *Truck Drivers Union, No. 449,* 353 U.S. 87.

restraints on sale of employee services are not conspiracies outlawed by *Sherman*. It nullifies and renders meaningless the immunity granted labor unions under that Section, and renders the right of collective bargaining illusory and "the road to prison", condemned in *U. S. v. Hutcheson*, 312 U.S. 219, 234-35.

Indeed, since *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, declared that *Sherman's* policy was "to preserve a competitive business economy" with "the rights of labor to organize to better its conditions through the agency of collective bargaining" (p. 806), the Sixth Circuit's holding herein would be antithetical to *Sherman's* policy.

Ignoring the district court's expressed doubt concerning the propriety of jury findings (*ante*, p. 8), the Sixth Circuit achieves its result of tainting as illegal a lawfully-obtained collective bargaining agreement and legally-accomplished union objectives of higher standards of wages and working conditions permissible under national labor law by adopting the district court's evaluation of the evidence as "conflicting" when in fact *it is undisputed*, and by employing erroneous trial techniques at variance with prior well-established judicial trial principles.

The Sixth Circuit's affirmance of jury findings invites Justices Goldberg-Harlan-Stewart's admonition in *first Pennington's* concurrence against "judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws, by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects" (381 U.S. 716) and inveighs against jurors becoming "arbiters of the economic desirability of the wage scale in the Nation's coal industry", asserting "neither have the aptitude nor possess the

criteria for making this kind of judgment" and avowing disbelief that "Congress has sanctioned judicial wage control under the umbrella of the Sherman Act" (pp. 718-19).

If upheld, the Sixth Circuit's affirmance of the jury verdict will herald the destruction of industry-wide, multi-employer collective bargaining. The Sixth Circuit's preference accorded regional bargaining stands in contrast to plaintiffs' unwillingness to join other coal producers in negotiating a multi-employer agreement which has produced uniformity of labor standards, including an industry-wide welfare and retirement fund, for approximately 80% of employees engaged in bituminous coal mining. The Sixth Circuit's pattern for regional collective bargaining stands in deep opposition to this Court's recognition in *NLRB v. Truck Drivers Union, No. 449*, 353 U.S. 87, 95, that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations" and its recognition that multi-employer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining". It stands in variance to this Court's avowal in *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959) that "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed", that *Taft-Hartley's* purposes "are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves" and "To allow the application of the . . . antitrust law here would wholly defeat the full realization of the congressional purpose" and "frustrate the parties' solution of a problem which Con-

gress has required them to negotiate in good faith toward solving . . ." (358 U.S. 295-96).

1. The Sixth Circuit's Sanction of the Jury's Determination of PWC's Meaning and Validity Conflicts With Prior Decisions of This Court and With the Sixth Circuit's Second Pennington and Ramsey.

Consistently, from *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503, through *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106, including *first Pennington* (381 U.S. 657), this Court has recognized that elimination of wage competition is not the kind of restraint Congress intended *Sherman* to proscribe; and because employers and unions are required to bargain about wages, hours and working conditions, this Court rejected condemning labor agreements as illegal *per se*, declaring it "will not assume that unions and employers will violate the federal law" and that the *illegality-per-se* doctrine applies only where the contract explicitly calls for illegal conduct. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699-700. A labor agreement "standing alone" would not violate *Sherman* (*Allen Bradley Co. v. Local 3, Electrical Workers*, 325 U.S. 797) and "An unlawful purpose is not lightly to be inferred" (*NLRB v. McGahey*, 5 Cir., 233 F.2d 406).

Concededly, PWC's language, its historic background, and the denials of union and management representatives alike that UMW entered into no agreement other than the National Agreement, herein and in *Ramsey* (*ante*, pp. 21, 23-24) are identical. Of the *sole* factual difference in the two cases, namely, the JICC minutes, the Sixth Circuit herein recites (A. 11a) that JICC "sent out forms to operators requiring them to certify that they had fully complied with the national agreement". Though nothing therein suggests a conflict of evidence or con-

notes an anti-competitive agreement, the Sixth Circuit adopted the district court's appraisal that "The evidence was *conflicting*" (A. 6a) and because thereof "the finding of the jury is supported by substantial evidence" (A. 13a).

However, there was no conflict: witnesses agreed, *without contradiction,* UMW agreed with no operator whereby UMW was prevented from negotiating or executing a contract on terms different from the National Agreement's terms, and asserting affirmatively there was no understanding UMW would impose the National Agreement upon employers other than those bargaining at the particular time (1648a, 1053a).

a. Previous Sixth Circuit Cases Have Held PWC Valid By Implementing a Rule of Construction Adopted By This Court.

The Sixth Circuit's *second Pennington* (400 F.2d 814) and *Ramsey* (72 LRRM 2323) held PWC valid by applying the principle that because PWC "is capable of two reasonable constructions . . . the construction should be adopted that does not result in a violation of law", citing this Court's *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686 (1931) and the Seventh Circuit's *Perry Coal Co. v. NLRB*, 284 F.2d 910, 914 (1960). Both *second Pennington* (400 F.2d 814) and *Ramsey* (72 LRRM 2323) concluded that "properly construed" PWC did not require the union to impose the wages therein contained on the non-signatory employers.

b. The Sixth Circuit's Approval of the Jury Verdict Required it to Ignore Trial Principles Previously Sanctioned by it.

In both the Sixth Circuit and the district court, UMW contended *second Pennington* and *Ramsey* held PWC valid and it was error to submit for jury determination PWC's meaning and validity.

Ramsey's procedure in holding PWC valid was first to implement the noted rule of construction (265 F.Supp. 412) and then to inquire whether the evidence supported an implied, as distinguished from an express, commitment to BCOA that UMW would bargain with other operators only upon the National Agreement's terms and noted that "All of the direct evidence . . . expressly denies" the conspiracy and "Every officer of the Union who testified, as well as every representative from the coal industry alleged to be in on the conspiracy, denied its existence" (265 F.Supp. 432). In total variance from *Ramsey's* pattern and that in *second Pennington*, holding PWC valid, the Sixth Circuit herein ignored the lack of conflict, the undisputed evidence of PWC's background and, disregarding the vital rule of construction which proclaimed its validity in two other cases and without explaining its inapplicability, sanctioned the contract's terms by the jury, holding "Evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation" (A. 10a).

Cases cited by the Sixth Circuit (A. 10a)[20] to support its holding are inapposite, since (1) none involved a labor agreement of labor's exemption from antitrust laws, and (2) none concerned the rule of construction which impelled the Sixth Circuit's validity holdings in *second Pennington* and *Ramsey*.[21]

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[20] *United States* v. *Continental Oil Co.*, 10 Cir., 364 F.2d 516 (1966); *Steele* v. *McCargo*, 8 Cir., 260 F.2d 753 (1958); *Hawkins* v. *Frick Reid Supply Corp.*, 5 Cir., 154 F.2d 88 (1946).

[21] The Sixth Circuit's characterization of PWC's Paragraph B as a "boycott", connoting some illegality thereto, is to be compared with the conflicting views in *Lewis* v. *NLRB*, D. C. Cir., 350 F.2d 801, and *Boyle, et al.*, 179 NLRB No. 80, 72 LRRM 1426, Nov. 4, 1969 (NLRB Chairman McCulloch dissenting), which sanctioned PWC's Paragraph B as a *labor standards clause*, permissive under Section 8(e), Labor Management Relations Act, 1947, as amended [29 USCA 158 (e)]. *NLRB's holding is crucial in light of first Pennington's recognition of national labor policy as reflected by NLRB decisions* (381 U.S. 666-68).

The Sixth Circuit's recital that "UMW struck operators who refused to agree to the national contract", obviously intended by the Sixth Circuit to indicate illegal conduct, is answered by *Hunt v. Crumboch,* 325 U.S. 821, 824, declaring that, "It is not a violation of the Sherman Act for laborers in combination to refuse to work" and "They can sell or not sell their labors as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws". *Accord*: *Apex,* 310 U.S. 503.

Moreover, the Sixth Circuit took no cognizance that the district court, as to PWC, declared, "if this Court were now called upon to weigh the evidence as a trier of facts it would reach the same conclusion with respect" to PWC's meaning "as it reached" in *Ramsey* (A. 57a).

Since the Sixth Circuit's approval was based upon its agreement that the jury verdict as to PWC "is supported by substantial evidence" (*ante,* pp. 8-9, 12), UMW's discussion concerning the issue of "substantial evidence", discussed *post,* pp. 37-41, is equally apposite to PWC.

2. The Sixth Circuit's Approval of the Jury's Verdict on the Premise It Was Supported by "Substantial Evidence" Collides With and Ignores Guidelines of Prior Important Decisions of This Court and the Sixth and Tenth Circuits for Determining the Meaning of "Substantial Evidence".

In agreeing with the district court that the jury verdict as to liability had support of "substantial evidence", the Sixth Circuit ignored prior decisions of this Court and the Sixth Circuit for determining the meaning of that term.

As in *Ramsey,* the instant record contained no direct proof of conspiracy. No operator or other person supported the jury's finding of intent and agreement that

UMW would impose the National Agreement upon other bargaining units. As in *Ramsey,* plaintiffs relied upon circumstantial evidence, with the sole exception of proof relating to PWC and JICC, the validity of which has been demonstrated (*ante*, pp. 34-37). As in *Ramsey, without contradiction,* the direct evidence expressly denied plaintiffs' conspiracy contention, for every union and every management representative testifying denied a conspiracy's existence.

The Sixth's Circuit's view herein that such denials were "not conclusive on the jury, which had the right as well as the duty to consider their denials in the light of the other evidence in the case" (A. 12a), collides with this Court's approval in *C. & O. R. Co. v. Martin*, 283 U. S. 209, 219-20, of the rule that "It is not proper to submit *uncontradicted* testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . . .". In such circumstances, *Browning v. Crouse*, 10 Cir., 356 F.2d 178, declares that, "no question of credibility or issue of fact is presented for determination by a trier of fact."

Since TCC and Grundy had the burden of proving the alleged conspiracy, mere speculation "is not allowed to do duty for probative facts" nor "supply the place of proof". *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 32; *Moore v. C. & O. Ry. Co.*, 340 U.S. 573, 578.

The district court's *Ramsey* (265 F. Supp. 432), affirmed by the Sixth Circuit (72 LRRM 2321), reviewed the evidence as a whole, which admittedly included all evidence herein other than the JICC minutes (which clearly lacked evidentiary support of a conspiracy), all

pre-1958 Agreement evidence as to which the jury herein has exonerated UMW of the conspiracy charge, as well as the events in the 1959-1963 period, rejected that *Ramsey* plaintiffs were victims of a UMW-operator conspiracy to eliminate or suppress competition or eliminate the sale of coal by those plaintiffs, and declared, "While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary" and "The latter, when coupled with the positive denial by many witnesses of any conspiracy, as well as other inferences favorable only to" UMW, "do not permit a finding based upon clear proof of an anti-trust conspiracy" (265 F. Supp. 432).

Nor is the jury verdict supported by legitimately derived inferences so as to bring the jury's verdict within the "substantial evidence" meaning. Though verdicts premised upon circumstantial evidence in antitrust cases have been sustained, the circumstances proven must lead with *reasonable certainty* and be of such probative force as to create a basis for a legal inference, not mere suspicion. Where, as herein, UMW could forfeit its labor exemption only upon clear, unequivocal and convincing proof (*first Pennington; second Pennington; Ramsey*), *certainty must satisfy that standard of proof.*

The Sixth Circuit's conclusion of "substantial evidence" support conflicts with *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 340-41, which precludes use of inferences to prove conspiracy where there is "*uncontradicted testimony of unimpeached witnesses* . . . that the fact sought to be inferred did not exist". *Chamberlain* approved (p. 340) the rule that, "*When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been estab-*

lished by legitimate proof", and *"A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong"*.

Herein, in affirming the jury verdict, the Sixth Circuit failed to implement the rule that where two equally reasonable inferences can be drawn from circumstances, innocent conduct must be inferred in the absence of evidence to the contrary. It has abandoned its adherence to the rule that any inference favorable to TCC and Grundy would offer the jury no more than *a choice of probabilities to conjecture or guess;* and "In this state of the record . . . the controversy calls for the application of the principle frequently applied by this and other courts, namely: *that to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial"*. *Gulf Refining Co. v. Mark C. Walker & Son Co.*, 6 Cir., 124 F. 2d 420, 425, 426; *Troutman v. Mutual Life Ins. Co. of N. Y.*, 6 Cir., 125 F. 2d 769, 772; *U. S. v. Saunders*, 6 Cir., 325 F. 2d 840, 843; *Dayton Veneer & L. Mills v. Cincinnati, etc., Ry. Co.*, 6 Cir., 132 F. 2d 222, 223.[22]

The Sixth Circuit's approval of the jury verdict is at variance with the rule expressed in Moore's Federal Practice, 2d Ed., Vol. 5, p. 2317, "where there is a complete absence of . . . proof on an issue or issues material to the cause of action", *a directed verdict is proper* and is "a method for protecting neutral principles of law from powerful forces outside the scope of law—com-

[22]Despite the Sixth Circuit's ruling in *Dayton*, the district court erroneously cited it in support of its view that the test of the evidence's sufficiency was whether there was support by "substantial evidence" (A. 50a).

passion and prejudice." (Cf. *Rutherford v. Illinois Central R.R.*, 5 Cir., 278 F.2d 310, 312, cert. den. 364 U.S. 922; also *Edwards v. U. S.*, 6 Cir., 140 F.2d 526):

3. The Sixth Circuit's Sanction Herein of Effects and Consequences as a Substitute for Predatory Conspiracy Proof Conflicts With This Court's First Pennington, With The Sixth Circuit's Holdings in Second Pennington and Ramsey and With This Court's Denial of Certiorari in Second Pennington.

A union's antitrust immunity under *Clayton's* Section 6 exists to prevent juries and courts alike from inferring a conspiracy on a union's part to restrain trade from sanctioned conduct. As in the instant case, lawful exercise of collective employee rights is converted into a conspiracy by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of its members' interests. If its conduct can be adjudged in light of effects and consequences of an industry-wide bargaining agreement, a union's immunity from *Sherman* is fanciful. So long as a union acts as agent of employees exercising collective rights guaranteed by *Taft-Hartley's* Section 7, it is not subject to liability under *Sherman*, whatever the foreseeable economic consequences of its conduct. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (312 U.S. 232), and that sanctioned conduct under *Clayton* could not serve as a predicate for a *Sherman* violation, are equally apposite to conduct which finds sanction under *Taft-Hartley's* Section 7, and renders unavailable the use of an inference of conspiracy from permissible activity.

Plaintiffs theorized that "parties intend to bring about the necessary effects and consequences of their agree-

ments and business dealings", and that "intent may be inferred" therefrom.[23] In accepting such thesis based upon unemployment resulting from intensive mechanization, the inability of operators in poor geological conditions to keep pace, the losses of coal producers in 1959 as compared with net profits of two of the largest coal producers (1527-28a, 1530a, 1975a) and stamping UMW's complaint on instructions pertaining thereto (*ante*, p. 14-15) as one *not meriting discussion* (A. 22a), the Sixth Circuit ignored its contrary holdings in *second Pennington* (400 F.2d 806, 814) and *Ramsey* (72 LRRM 2321, 2324-25) that *first Pennington* required a finding of "anti-competitive conspiracy".

Second Pennington's certiorari petition complained the Sixth Circuit had failed to consider "the drastic effects throughout the whole industry and areas devoted to coal mining of the practices complained" therein; they assigned as a reason for granting the writ that "Industry-wide bargaining is a potent factor in our economic order" and "has a natural tendency to favor" the industry's dominant units negotiating contracts over smaller and weaker units; but this Court rejected (393 U.S. 983) review of the question (Petition 4), "Was the District Court (sustained by the Court of Appeals) right in holding that *effects of industry-wide bargaining are alone insufficient and were both lower courts right in not considering anywhere in their findings and conclusions such effects . . .?*" Its rejection is vital since

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[23]Brief of Tennessee Consolidated Coal Company, et al., in the Sixth Circuit, pp. 35-36, 44, 76-77.

the question posed included *the identical indicia* now asserted by plaintiffs.[24]

a. The Sixth Circuit's Acceptance Herein of Effects and Consequences in Lieu of Conspiracy Conflicts With This Court's First Pennington.

Substitution of effects and consequences would totally ignore labor's exemption and *first Pennington's* requirement that a prerequisite to a forfeiture of that exemption is proof that a union "has *agreed* with one set of employers to impose a certain wage scale on other bargaining units". It would completely strip of meaning Justice White's avowals that unilaterally a union may adopt a uniform wage policy and seek vigorously to implement it, and the union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. It would render meaningless Justice White's further unequivocal statement that, "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under" *Sherman*, and *"There must be additional direct or indirect evidence of the conspiracy"* (381 U.S. 665 and fn. 2).

The Sixth Circuit's *Ramsey* (per Circuit Judge Edwards) read *first Pennington* as requiring proof of an anti-competitive conspiracy and, though recognizing de-

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[24]In the certiorari petition in *second Pennington* (Case No. 558 in this Court), Question 5 read thus:

"Was the District Court (sustained by the Court of Appeals) right in holding that effects of industry-wide bargaining are alone insufficient, and were both lower courts right in not considering anywhere in their findings and conclusions such effects—the growing prosperity of the two largest companies and the deficit position of all the rest of the industry combined, the inevitable and accelerating merger and concentration trend, the blight created in broad areas where conditions make the contract impossible, the loss of jobs of two-thirds of union members from automation made necessary by national contracts with nothing in the contracts to relieve the unemployed, the intensive and often violent efforts of the union to destroy the businesses of non-conforming operators, the waste of vital natural resources in abandonment of all but those areas of mines which can be stripped off the easiest of worked underground with large machines".

nial of certiorari did not represent an affirmance of *second Pennington,* avowed it "inappropriate to discount completely the denial", and that had the district court or the Sixth Circuit in *second Pennington* interpreted *first Pennington* instructions erroneous, "we find it difficult to believe that the Supreme Court would have ignored the error" (72 LRRM 2325).[25]

Consonant with *second Pennington* and *Ramsey* holdings that proof of "predatory intent" is essential, is the Third Circuit's declaration in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-03 (1961), that "conspiracy remains an essential ingredient of a" *Sherman* case.

The thrust of the Sixth Circuit's opinion does not impinge upon UMW alone. Under it, collective bargaining on a national scale stands threatened. Every industry-wide collective bargaining agreement, every labor union and every employer signatory to a multi-employer agreement is rendered a suspect for charges of violating *Sherman* by any disgruntled employer seeking to operate at wage levels lower than those achieved in industry-wide bargaining.

The Sixth Circuit's opinion invites chaos in the existing pattern of multi-employer national bargaining agreements attained only after a long, bitter and expensive experience and currently prevalent in all major industries in this country. If the Sixth Circuit's result is permitted to stand, the public interest will be thwarted because no national union could hereafter safely expose itself to criminal, injunctive and monetary penalties imposed upon it by the Sixth Circuit's pattern in discharging the

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[25]As noted, *Ramsey's* affirmance was by an equally divided court.

very duties and functions constituting the purpose of its existence.

Congressional will concerning industry-wide bargaining, judicially recognized, accentuates the need for review of the Sixth Circuit's judgment and opinion by issuance of the Writ sought herein.

B. THE SIXTH CIRCUIT'S HOLDING THAT SECTION 6 OF THE NORRIS-LaGUARDIA ACT DOES NOT REQUIRE THE UNLAWFUL ACT OF CONSPIRACY TO BE SHOWN BY CLEAR PROOF REPRESENTS AN INCORRECT INTERPRETATION AND APPLICATION OF A PRIOR IMPORTANT DECISION OF THIS COURT CONSTRUING THE NORRIS-LaGUARDIA ACT. IT CONFLICTS, TOO, WITH SIXTH CIRCUIT DECISIONS ENTERED BOTH PRIOR AND SUBSEQUENT TO THE INSTANT ACTION.

Though conceding Norris-LaGuardia's Section 6 provides that participation, authorization or ratification must be shown by clear proof, *the Sixth Circuit holds that "Section 6 does not state that the unlawful acts must be shown by clear proof"* (A. 17a). The Sixth Circuit's holding conflicts with this Court's *Carpenters v. U. S.*, 330 U.S. 395 and *Gibbs* (383 U.S. 736) which specifically pointed out that *Carpenters, an antitrust case,* declared Section 6's "purpose and effect was to relieve" labor unions "from liability for damages or imputation of guilt for lawless acts done . . by some individual officers or members of the organization, *without clear proof* that the *organization* . . . charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration". Unions were to be insulated against liability except upon clear proof as enunciated in Section 6. Actual, not theoretical, culpability or complicity would provide a basis for union responsibility. Repetitive use of the word *"actual"* in Section 6 undeniably evinces Congressional intent that

union liability was to rest upon *actual* realities and not imputations.

In its most recent appraisal of the issue (September 26, 1969) which affirmed *second Pennington* (400 F.2d 814, decided September 11, 1968), the Sixth Circuit's affirming opinion in *Ramsey* believed Judge Peck[26] (and Judges Wilson and Taylor)[27] were right in holding that the 'clear proof' standard of the Norris-LaGuardia Act is the proper standard of proof applicable to a Sherman Act suit against a labor union", citing both *Carpenters* and *Gibbs* (72 LRRM 2325). The affirming opinion (per Circuit Judge Edwards) recites it is "impossible for a labor union to act except by dint of actions of its officers, members or agents"; that *"Even more specifically pertinent to the standard of proof applicable to this case is the fact that this action is a claim of violation of the Sherman Antitrust Act by an illegal conspiracy to drive plaintiffs out of business on" UMW's part;* and that "Such a conspiracy could obviously be carried out only by officers, members or agents of the union acting in an agency relationship" (72 LRRM 2325). As Circuit Judge Edwards states, "Any reconciliation of national labor policy with national antitrust policy demands application" of the clear proof standard (72 LRRM 2325).

C. THE SIXTH CIRCUIT'S SANCTION OF THE DISTRICT COURT'S JURY CHARGE AS TO SPECIFIC INTENT COLLIDES WITH THIS COURT'S FIRST PENNINGTON AND OTHER FEDERAL DECISIONS.

Antitrust laws are concerned with anti-competitive aspects and unreasonable restraints. Indeed, the Sixth Circuit's *second Pennington* (400 F.2d 814) read *first*

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[26]*Second Pennington's* opinion in the Sixth Circuit was issued through Circuit Judge Peck.

[27]District court judges who prepared the opinions in *Ramsey* and *second Pennington*, respectively.

Pennington as teaching that predatory intent "as used by Mr. Justice White" (381 U.S. 668) "is merely shorthand, employed to describe" an anti-competitive conspiracy. Herein, the Sixth Circuit swept aside UMW's contention that the district court erred in its jury charge as to "specific intent to . . . destroy competition" as one not meriting discussion (*ante*, p. 16). Its view stands in conflict with its subsequent *Ramsey* approval (72 LRRM 2324) of what the Sixth Circuit had held in *second Pennington*.

D. THE SIXTH CIRCUIT'S APPROVAL OF THE JURY VERDICT PRESENTS A SUBTLE DESTRUCTION OF LABOR'S IMMUNITY GRANTED BY CONGRESS AND RECOGNIZED BY THIS COURT.

The Sixth Circuit's rulings herein complained of are not only erroneous but threaten the effectiveness of labor's immunity from conduct interdicted by *Sherman*. Where, as herein, the Sixth Circuit has not concerned itself with the district court's doubt concerning the jury's findings adverse to UMW, and its rulings are erroneous and offensive not only to prior decisions of this Court but also to Sixth Circuit rulings both prior and subsequent to the instant rulings, it becomes obvious that adoption of the Sixth Circuit's erroneous pattern presents a subtle destruction of labor's exemption under *Clayton's* Section 6.

The Sixth Circuit's affirming opinion in *Ramsey* (72 LRRM 2325-26) *realistically* recites that *"Since in every instance labor unions are seeking agreements with employers on wages, hours and working conditions, and in every such instance both the employer and the union have a strong (albeit separate) motive for extending such agreement to other employers in the same field, it would be simple to defeat the national policy of encouraging collective bargaining by allowing easy implication of*

union-employer antitrust conspiracies". The Sixth Circuit's opinion herein has achieved national labor policy's defeat.

E. THE NEED FOR THIS COURT'S GUIDANCE IN PENDING CASES INVOLVING SIMILAR CLAIMS EMPHASIZES THE IMPORTANCE OF THE WRIT'S ISSUANCE HEREIN.

Exclusive of the instant case, there are currently pending in federal district courts cases wherein coal producers seek damages against UMW in an amount, when trebled, exceeding 3 million dollars and in the Sixth Circuit two cases, when trebled, aggregating 23 million dollars.[28] All cases are grounded in claims similar to or identical with that in the instant case and all involve the same issue of charged conspiracy under *Sherman*. Cases pending in district courts are within the Sixth Circuit's jurisdiction (other than one pending in a district court within that of the Seventh Circuit). Of the pending cases, three will be concerned with jury trials. As indicated herein, rulings of the Sixth Circuit have

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Style	Action No.	Court	Amount	Date Filed
Big Three Coal Co., Inc. v. *UMW*	CV 68-1115-D	USDC, E.D., Ill.	$ 2,473,545.00	1962
Scotia Coal Co. v. *UMW*	308	USDC, E.D., Ky.	802,500.00	1966
South-East Coal Co. v. *UMW*	19,623	USCA, 6 Cir.	7,566,356.00	1966
George Ramsey, et al. v. *UMW:*				
District Court	3667	USDC, E.D., Tenn., S.D.	15,150,000.00	1961
Sixth Circuit	17,878	USCA, 6 Cir.		

[Note:] In *Ramsey*, the district court exonerated UMW of the conspiracy charged; an equally divided court in the Sixth Circuit affirmed the district court. Mandate stayed pending filing of petition for writ of certiorari by plaintiffs.

been inconsistent and those herein are erroneous. Heretofore, certiorari has been awarded "because determination of the issue raised here will guide adjustment of a large body of similar claims now pending" *(Alcoa S.S. Co., Inc.* v. *U. S.*, 338 U.S. 421, 423), or because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification" *(Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U.S. 667, 671), or because of the "importance of the principal question" *(U. S.* v. *Standard Oil Co.*, 332 U.S. 301, 302).

The need for this Court's guidance, particularly in cases involving jury trials, should impel issuance of the Writ herein.

F. THE SIXTH CIRCUIT'S SANCTION OF THE DISTRICT COURT'S REFUSAL TO STRIKE THE JURY PANEL IS OFFENSIVE TO PRIOR DECISIONS OF THIS COURT AND OF THE FIFTH CIRCUIT.

The Jury Selection and Service Act of 1968[29] was enacted because the "key man" system, coupled with the practice of objective screening, consistently failed to produce representative jury venires. Senate Report No. 891, relating to the Jury Selection and Service Act of 1968, makes this precise point: "The actuality of *unintentional discrimination* was documented only recently in the case of *Rabinowitz v. United States*, 366 F.2d 34 (1966). In that case, the operation of the key man system in one set of circumstances was condemned *even though it was stipulated that the officials responsible for selection did not consciously engage in discriminatory practices.* En banc, . . the Fifth Circuit concluded that the key man system in question led to a

[29]28 USCA 1861, *et seq.*, as amended, 1969 USCA Cumulative Annual Pocket Part, Sections 1861-64, Public Law 90-274, Section 101.

jury list that did not represent a fair cross section of the community". *Congressional Record,* Vol. 113, Pt. 26, p. 35628 (December 8, 1967).

It further states the "key man" system's discriminatory impact "is by no means limited to racial discrimination" but also affects others, including *laborers.*

The Sixth Circuit's sanction of the district court's refusal to strike the jury panel herein is offensive, not only to *Rabinowitz,* but also to this Court's *Thiel* (328 U.S. 217), as discussed, *ante,* p. 20.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the judgments, orders and as aforesaid. Petitioner intends to urge each of the points and questions presented, though not argued herein.

Respectfully submitted,

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